Supreme Court, U.S.
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No.

# Supreme Court of the United States

**DONALD RAPIER,**

***Petitioner,***

**vs.**

**UNITED STATES OF AMERICA,**

***Respondent.***

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

**DONALD RAPIER**
**% Ronald Raper**
**6435 Ladera Drive**
**Houston, TX 77083**

BEST AVAILABLE COPY

## QUESTION PRESENTED

1.) Where a federal criminal defendant pleaded guilty and it is uncontested that he was never advised of a viable statutory affirmative defense which was such that he would not have pleaded and would have instead proceeded to trial, is his claim of ineffective assistance of counsel in the plea process defeated by the lower courts' determination that other constitutional defenses would not have prevailed at trial?

## PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner Donald Rapier and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Donald Rapier, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on 5-11-04.

## OPINIONS BELOW

The 5-11-04 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District Of Texas, entered on 6-6-00, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the direct appeal in this case, entered on 1-24-02, is an unpublished decision reported at 2002 U.S. App. LEXIS 3816 and is reprinted in the separate Appendix C to this Petition.

The 10-7-02 decision of this Court granting certiorari, vacating the Fifth Circuit decision and remanding for reconsideration in light of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02) is a published decision reported at 123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396 and is reprinted in the separate Appendix E to this Petition.

The 3-17-03 order of the Fifth Circuit on remand from this Court is an unpublished decision and is reprinted in the separate Appendix F to this Petition.

The 6-2-03 decision of this Court denying certiorari after remand is a published decision reported at 539 U.S. 904; 123 S. Ct. 2258; 156 L. Ed. 2d 113; 2003 U.S. LEXIS 4314 and is reprinted in the separate Appendix G to this Petition.

The prior opinion and judgment of the United States District Court for the Southern District Of Texas, denying Mr. Rapier's motion pursuant to 28 U.S.C. § 2255, entered on 12-8-03, is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the Southern District Of Texas, denying Mr. Rapier's Request for Certificate of Appealability, entered on 12-8-03, is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-11-04. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 2252A provides in relevant part:

> § 2252A. Certain activities relating to material constituting or containing child pornography
>
> (a) Any person who--
>
> (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
>
> (2) knowingly receives or distributes--
>
> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

* * * * * * * * * * *

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

* * * * * * * * * * *

shall be punished as provided in subsection (b); or

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the

Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

* * * * * * * * * * *

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

## STATEMENT OF THE CASE

On 5-26-00, Mr. Rapier was sentenced to a term of 60 months incarceration for violation of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2). (CR 6-2-00) (USDC DOCKET SHEETS)

On 12-1-03, Mr. Rapier filed a motion pursuant to 28 U.S.C. § 2255 with the District Court for the Southern District Of Texas. In this motion, Mr. Rapier pleaded, *inter alia*:

> 3.) On or about 2-14-00 Donald Rapier was charged with violation of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2). (Appendix, Exhibits A-C)[1]
>
> 4.) These charges arose from the seizure and "forensic analysis" of the deleted files from his laptop computer after arrival in the United States from the Orient. (Appendix, Exhibits A4, E14-E15)
>
> * * * * * * * * * *
>
> 8.) Mr. Rapier was arraigned on or about 2-14-00 at which time he pleaded not guilty to the charged violations. (Appendix, Exhibits C)
>
> 9.) On or about 3-6-00, Mr. Rapier was rearraigned and pleaded guilty to violations of 18 U.S.C. § 2252A(a)(1) and 18

[1] The exhibit numbers refer to the exhibits attached to Mr. Rapier's motion pursuant to 28 U.S.C. § 2255.

U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2). (Appendix, Exhibits A-C)

10.) Subsequent to his plea of guilty and preparation of the Presentence Report, it was discovered that Mr. Rapier was probably subject to a statutory mandatory minimum sentence of 5 years incarceration pursuant to 18 U.S.C. § 2252A(a)(2) based on a prior Texas state deferred adjudication of a charge.

11.) On 5-26-00 Mr. Rapier was rearraigned for the second time. At the rearraignment, the District Court advised Mr. Rapier of the probable imposition of a statutory maximum mandatory minimum sentence under 18 U.S.C. § 2252A(a)(2) based on the prior Texas state deferred adjudication of a charge. Mr. Rapier was allowed the opportunity to withdraw his plea, *based solely on the fact that the Court had not advised him of the potential mandatory minimum sentence of 5 years*. Based on the advice of counsel, Mr. Rapier persisted in his plea of guilty. (Appendix, Exhibits C)

12.) On 5-26-00, immediately subsequent to rearraignment and plea, Mr. Rapier was sentenced to 60 months incarceration for violations of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2). This sentence represented the statutory mandatory minimum sentence under 18

U.S.C. § 2252A(a)(2) based on the prior Texas state deferred adjudication of a charge. (Appendix, Exhibits A-C)

13.) Mr. Rapier filed a direct appeal. In the direct appeal, he challenged the validity of his plea based solely on the fact that he had been initially misadvised as to the potential application of the 5 year mandatory minimum under 18 U.S.C. § 2252A(a)(2) based on the prior Texas state deferred adjudication of a charge. Mr. Rapier also argued that his prior Texas deferred adjudication did not qualify to invoke the mandatory minimum sentence under 18 U.S.C. § 2252A(a)(2). Finally, Mr. Rapier argued that the Court's order to Mr. Rapier to register as a sex-offender with the State of Texas and order to Mr. Rapier to attend a sexual offenders group run by the Baylot College of Medicine in Houston, Texas, incriminated Mr. Rapier to the point where any plea withdrawal and remand for jury trial would have been fruitless. Finally, Mr. Rapier attempted to raise a claim of ineffective assistance of counsel.

14.) On 1-24-02, the Court of Appeals denied Mr. Rapier's direct appeal. *United States v. Rapier*, 31 Fed. Appx. 836; 2002 U.S. App. LEXIS 3816 (5th Cir. 1-24-02). (Appendix, Exhibits G)

15.) Mr. Rapier timely filed a Petition for Writ of Certiorari with the Supreme Court. In this petition, Mr. Rapier argued that his plea, conviction, and sentence were violative of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02) based on the plea colloquy and indictment in his case.

16.) On 10-7-02, the Supreme Court granted certiorari, vacated the Court of Appeals decision and remanded for further consideration of Mr. Rapier's case in light of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02). See *Rapier v. United States*, 123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396 (10-7-02) (Appendix, Exhibits H)

17.) On remand, the Court of Appeals limited it's consideration of Mr. Rapier's case to whether the indictment and plea colloquy were sufficient to support his conviction and sentence. Finding in the affirmative, the Court of Appeals reaffirmed Mr. Rapier's conviction and sentence. *United States v. Rapier*, 2003 U.S. App. LEXIS 6123 (5th Cir. 3-17-03)

18.) Mr. Rapier filed a second Petition for Writ of Certiorari with the Supreme Court. In this petition, Mr. Rapier argued that the Court of Appeals erred in finding that the indictment and plea colloquy were sufficient to support his conviction and sentence. On 6-2-03, the Supreme Court denied this petition without comment. *Rapier v. United States*, 123 S. Ct. 2258; 156 L. Ed. 2d 113; 2003 U.S. LEXIS 4314 (6-2-03) (Appendix, Exhibits J)

19.) While the Court of Appeals ultimately held, in the direct appeal of Mr. Rapier's case, that the indictment was sufficient and the factual basis for Mr. Rapier's plea, as set forth in the plea colloquy, complied with Federal Rule of Criminal Procedure 11 and the Court of Appeals also

held, *based on the record of the plea colloquy*, that Mr. Rapier's conviction was therefore not affected by *Ashcroft*, the Court of Appeals did **not** address whether Mr. Rapier's plea was knowing and voluntary *due to ineffective assistance of counsel*. The Court of Appeals specifically declined to address "ineffective assistance of counsel" during the direct appeal. (Appendix, Exhibits G4-G5) The Court of Appeals did not address whether Mr. Rapier could establish "actual innocence". The Court of Appeals did not address whether or not the evidence, *other than his plea colloquy*, established that actual minors were depicted in the images recovered from his computer hard drive through "forensic analysis". (Appendix, Exhibits I)

* * * * * * * * * * *

26.) Mr. Rapier provided counsel with complete and accurate information and did not place any restrictions on counsel.

27.) Mr. Rapier relied completely and in all material respects on the advice of counsel.

28.) Mr. Rapier is "actually innocent" of the sentence imposed and for which he is presently "in custody".

**CLAIM NUMBER ONE**

29.) Mr. Rapier restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-28 herein.

30.) Mr. Rapier's plea of guilty, conviction, and sentence are violative of his Sixth Amendment constitutional right to effective assistance of counsel in the plea process as hereinafter more fully appears.

31.) Prior to trial and during the plea process, counsel could have but did not fully inform himself and Mr. Rapier as to all facts relevant to the determination whether to plead guilty or not guilty and proceed to trial.

32.) Prior to trial and during the plea process, counsel affirmatively misadvised Mr. Rapier that there was simply no factual defense and no chance he could prevail at trial due to the overwhelming weight and quality of the government's evidence. (Appendix, Exhibit F16)

33.) Counsel's failures set forth in ¶¶31-32 were due to an incomplete factual investigation as to the amount and quality of evidence available to the United States to use against Mr. Rapier.

34.) Prior to trial and during the plea process, counsel could have but did not fully advise Mr. Rapier as to the law relevant to the determination whether to plead guilty or not guilty and proceed to trial.

35.) Prior to trial and during the plea process, counsel affirmatively misadvised Mr. Rapier that no legal defense existed as to the charges in the indictment. (Appendix, Exhibit F16)

* * * * * * * * * *

38.) Prior to trial and during the plea process, counsel could have but did not advise Mr. Rapier of the availability of the affirmative defense at trial which was and is provided in 18 U.S.C. § 2252A(d). More specifically, counsel could have but did not advise Mr. Rapier that he had an affirmative defense at trial based on the fact that he had deleted the images of alleged child

pornography from his computer hard drive. Since the images of alleged child pornography had, in fact, been deleted from Mr. Rapier's hard drive and were only recovered through forensic analysis of the hard drive (Appendix, Exhibits A4, E14) this was certainly a viable defense of which Mr. Rapier could have been and should have been advised. This is especially true because Mr. Rapier did state to the Court at rearraignment that he thought he had deleted any possibly unlawful files from his computer. (Appendix, Exhibits E15-E17) Counsel could have but did not advise Mr. Rapier that there was certainly a reasonable probability that this defense would prevail at trial either as an affirmative defense or as a challenge to the "intent" element of the substantive crimes. Failure to advise Mr. Rapier of this potential defense was professionally unreasonable.

* * * * * * * * * *

41.) Counsel's acts and omissions set forth in ¶¶34-40 were due to an incomplete investigation of the law relevant to Mr. Rapier's determination whether to plead guilty or not guilty and proceed to trial. (Appendix, Exhibit F16)

* * * * * * * * * *

44.) Counsel could have but did not investigate the availability of the affirmative defense at trial which was and is provided in 18 U.S.C. § 2252A(d). More specifically, counsel could have but did not investigate whether Mr. Rapier had an affirmative defense at trial based on the fact that he had deleted the images of alleged child pornography from

his computer hard drive. (Appendix, Exhibit F16)

* * * * * * * * * * *

46.) In actual fact, Mr. Rapier believed that he had no possible or plausible defense, legal or factual, if he proceeded to *trial. His plea of guilty was predicated in* material part on counsel's affirmative misadvice and failures to advise which are set forth and pleaded herein.

* * * * * * * * * * *

48.) Counsel's omissions set forth in ¶¶31-44 were not the result of reasoned decisions based on strategic or tactical choices among all plausible options available to counsel for the defense of Mr. Rapier during the plea process.

49.) Counsel's omissions set forth in ¶¶31-44 were the result of counsel's abdication of the duty and responsibility to advocate Mr. Rapier's case and cause during the plea process.

50.) The advice received from counsel regarding whether to plead guilty or not guilty was so incorrect and so insufficient that it undermined Mr. Rapier's ability to make a voluntary and intelligent choice among the alternative courses of action open to him. The affirmative misadvice that was given to Mr. Rapier coupled with counsel's failures to advise Mr. Rapier of critically important facts and law relevant to the plea process completely distorted Mr. Rapier's perception of the 'risk factors' involved in pleading and going to trial.

51.) Based on the facts set forth in ¶¶31-50, Counsel's performance in the plea

process fell below the objective standard of reasonableness required by the Sixth Amendment.

52.) Based on the facts set forth in ¶¶31-50, Mr. Rapier's plea of guilty was not a voluntary and intelligent choice among the alternative courses of action open to him.

53.) Mr. Rapier was prejudiced by counsel's constitutionally ineffective and deficient performance set forth herein, because, absent said performance, there is a reasonable probability that Mr. Rapier would have pleaded not guilty and proceeded to trial. More specifically, but for counsel's unprofessional failures, ***both individually and collectively***, Mr. Rapier ***would*** have pleaded not guilty and proceeded to trial.

54.) Mr. Rapier was prejudiced by counsel's constitutionally ineffective and deficient performance set forth herein, because there is no difference between the sentence he obtained by his plea of guilty and the sentence he would have received after trial. More specifically, had Mr. Rapier pleaded not guilty and proceeded to trial, there is no reasonable probability he would greater sentence than he received after his plea of guilty. Moreover, the record demonstrates that Mr. Rapier was extremely reluctant to plead guilty. (Appendix, Exhibits E15-E17) The record also demonstrates that Mr. Rapier thought he had deleted all of the possibly illegal images from his computer. (Appendix, Exhibits E15-E17) Finally, there is at least a serious question whether the initial search and seizure of his laptop computer was the result

> of an unconstitutional extended border search.[2]
>
> 55.) The facts set forth in ¶54 plead and demonstrate "objective evidence" and "special circumstances" to support Mr. Rapier's allegations set forth in ¶53.
>
> * * * * * * * * * * *
>
> 57.) Mr. Rapier was prejudiced from the unprofessional acts and omissions of counsel, set forth herein, because said omissions undermine confidence in the reliability of the plea process in his case.

(Motion Pursuant to 28 U.S.C. § 2255, ¶¶3-4, 8-19, 26-35, 38, 41, 44, 46, 48-55, 57)

Mr. Rapier also pleaded that counsel failed to advise him of additional defenses at trial, including the a Fourth Amendment challenge and a First Amendment defense based on the then recent decision by the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083; 1999 U.S. App. LEXIS 32704 (9th Cir. 12-17-99).

On 12-8-03, without asking for any response from the government to the Section 2255 motion, the district court denied the motion and further denied a Certificate of Appealability. (Appendix D)

In the district court's denial, that court addressed the Fourth Amendment challenge and the First Amendment defense based on the then recent decision by the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083; 1999 U.S. App. LEXIS 32704 (9th Cir. 12-17-99). The district court's reasoning was that neither of these defenses would have prevailed at trial. (Appendix D)

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[2] See *United States v. Strauser*, 247 F. Supp. 2d 1135; 2003 U.S. Dist. LEXIS 3248 (ED MO 3-6-03) and *United States v. Perez*, 247 F. Supp. 2d 459; 2003 U.S. Dist. LEXIS 3162 (SD NY 3-5-03)

The district court did not address counsel's failure to advise Mr. Rapier of the affirmative defense set forth in 18 U.S.C. § 2252A(d). That is, the district court did not address counsel's failure to advise Mr. Rapier that he had an affirmative defense at trial based on the fact that he had deleted the images of alleged child pornography from his computer hard drive. (Appendix D)

***The district court did not address the effect that counsel's failures had on Mr. Rapier's decision to plead guilty.*** (Appendix D)

Mr. Rapier filed Request for Certificate of Appealability with the court of appeals. In the Request for Certificate of Appealability, Mr. Rapier quoted the allegations of his Section 2255 motion and renewed his argument that counsel's performance in the plea process was below the objective standard of *Hill v. Lockhart*, 474 U.S. 52, 56-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) causing his plea to become involuntary and that he was prejudiced thereby because but for counsel's unprofessional failures, ***both individually and collectively***, Mr. Rapier ***would*** have pleaded not guilty and proceeded to trial." (USCA Request for Certificate of Appealability, page 17, quoting Section 2255 motion, ¶53)

On 5-11-04, the court of appeals denied the Certificate of Appealability. In denying the Certificate of Appealability, the court of appeals observed that "the district court did not address his arguments that counsel failed to investigate a defense based upon his deleting the images from his computer", but then simply held:

> A COA will be issued only if the movant makes a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2). If the district court's dismissal is on the merits, "The [Movant) must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As Rapier has not made the required showing to obtain a COA, his motion for a COA is DENIED. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

(Appendix A)

Mr. Rapier demonstrates within that this Court should grant Mr. Rapier's Petition For Writ Of Certiorari because the court of appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## REASONS FOR GRANTING THE WRIT

**1.) THIS COURT SHOULD GRANT MR. RAPIER'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).[3] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

*McNabb*, 318 U.S. at 340.

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[3] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

**1A.) The Lower Courts' Analyses As To Whether Petitioner's First And Fourth Amendment Defenses Were Viable At Trial Did Not And Could Not Determine His Sixth Amendment Claim Of Violation Of His Rights In The Plea Process Due To Counsel's Failure To Advise Petitioner Of His Available And Viable Statutory Defense Under 18 U.S.C. § 2252A(d) Based On The Fact That He'd Deleted The Offensive Images From His Computer.**

As set forth in the Statement of the Case, supra, petitioner pleaded and argued to the lower courts that he had been affirmatively misadvised, *inter alia*, that no viable defense existed if he proceeded to trial. He also pleaded and argued that counsel could have but did not advise him of the availability of the affirmative defense at trial which was and is provided in 18 U.S.C. § 2252A(d).

More specifically, counsel could have but did not advise Mr. Rapier that he had an affirmative defense at trial based on the fact that he had deleted the images of alleged child pornography from his computer hard drive.

Since the images of alleged child pornography had, in fact, been deleted from Mr. Rapier's hard drive and were only recovered through forensic analysis of the hard drive (Appendix, Exhibits A4, E14) this was certainly a viable defense of which Mr. Rapier could have been and should have been advised. This is especially true because Mr. Rapier did state to the Court at rearraignment that he thought he had deleted any possibly unlawful files from his computer. (Appendix, Exhibits E15-E17) Counsel could have but did not advise Mr. Rapier that there was certainly a reasonable probability that this defense would prevail at trial either as an

affirmative defense or as a challenge to the "intent" element of the substantive crimes.

Mr. Rapier pleaded and argued that counsel's failure to advise him of this potential defense was professionally unreasonable and rendered his plea involuntary under *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The lower courts' rejection of these pleadings and argument departed from well settled law.[4]

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[4] *See United States v. Reyes*, 2002 U.S. App. LEXIS 11411 (5th Cir. 6-12-02) (ineffective assistance of counsel due to counsel's failure to object to the court's failure to explain guidelines during plea colloquy); *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000) (But for counsel's deficient performance, defendant would not have pled guilty); *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (counsel must not only "inform himself fully on the facts and law", but must also "thoroughly advise the client 'concerning all aspects of the case', and 'keep the client informed of developments in the case.'"); *Finch v. Vaughn*, 67 F.3d at 916 ("For a guilty plea to 'represent an informed choice' so that it is constitutionally 'knowing and voluntary,' the 'counsel must be familiar with the facts and law in order to advise the defendant ...The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis..."); *Hill v. Lockhart*, 877 F.2d at 703 (same) *Lewandowski v. Makel*, 949 F.2d 884, 887 (6th Cir. 1991) (same); *Iaea v. Sunn*, 800 F.2d at 865 (same); *Risher*, 992 F.2d at 983-84 (same); *United States v. Giardino*, 767 F.2d 30, 32 (1st Cir. 1986) (failure to inform defendant in plea process of factual defense below objective standard of *Strickland / Hill*); *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997) (Counsel was ineffective for giving incorrect sentencing information in contemplation of plea); *United States v. Ali*, 186 F.3d 1; 1999 U.S. App. LEXIS 17734 (1st Cir. 1999) (plea involuntary where counsel improperly advised defendant he would be eligible for "Safety Valve"

Mr. Rapier specifically pleaded and provided supporting evidence that, but for counsel's unprofessional failures, he would have pleaded not guilty and proceeded to trial. Again, the lower courts' rejection of these pleadings and argument departed from well settled law.[5]

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reduction if he pleaded guilty); *United States v. Davis*, 239 F.3d 283 (2nd Cir. 2001) (Counsel was ineffective by threatening to withhold services to encourage plea); *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001) (Counsel misinformed defendant about effect of plea agreement); *United States v. Stephen*, 2002 U.S. App. LEXIS 21158 (4th Cir. 10-10-02) (plea involuntary if counsel affirmatively misadvised defendant he would receive a lesser sentence through plea of guilty).

[5] *United States v. White*, 2004 U.S. App. LEXIS 8735 (4th Cir. 5-4-04) (ineffective assistance of counsel in the plea process where counsel and the government led defendant to believe he was pleading to a Rule 11(a)(2) conditional plea agreement and the courts subsequently determined his plea was not conditional); *United States v. Couto*, 2002 U.S. App. LEXIS 23680 (2nd Cir. 11-15-02) (ineffective assistance of counsel in the plea process, where counsel affirmatively misadvised defendant as to consequences of plea); *Hernandez-Hernandez v. United States*, 904 F.2d 758; 1990 U.S. App. LEXIS 8718 (1st Cir. 1990) (ineffective assistance of counsel in the plea process where defendant alleged that counsel told him he would receive a 10 year sentence instead of the 99 year sentence he actually received; an evidentiary hearing was held in spite of the fact that defendant stated at the plea colloquy that no promises had been made to him other than those stated in the plea agreement and in court); *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995) (plea vacated where counsel affirmatively misadvised defendant as to sentence he would receive); *United States v. Ali*, 186 F.3d 1; 1999 U.S. App. LEXIS 17734 (1st Cir. 1999) (same); *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995) (ineffective

Mr. Rapier did not plead or argue that he would have been *found not guilty* at trial. He pleaded instead that, but for counsel's unprofessional errors he would have *proceeded to trial*. This is a distinction that the lower courts overlooked in his case. As this Court long ago pointed out, in the plea process:

> "The ... 'prejudice' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

*Hill v. Lockart*, 474 U.S. at 59.[6]

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assistance of counsel in plea process where counsel failed to correct state trial judge's misstatements that state sentence could run concurrent with potential federal sentence); *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997) (Counsel was ineffective for giving incorrect sentencing information in contemplation of plea); *United States v. Streater*, 70 F.3d 1314 (D.C. 1995) (Counsel gave bad legal advice about pleading guilty); *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000) (But for counsel's deficient performance, defendant would not have pled guilty); *Nelson v. Hargett*, 989 F.2d 847; 1993 U.S. App. LEXIS 10190 (5th Cir. 1993) (failure to investigate or advise defendant of potentially meritorious speedy trial defense prior to pleading guilty rendered plea involuntary and potentially prejudiced defendant requiring remand to District Court); *United States v. Giardino*, 767 F.2d 30, 32 (1st Cir. 1986)(failure to inform defendant in plea process of factual defense below objective standard of *Strickland Hill*).

[6] See also *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995) ("There is a significant difference between the tests. Under

While the Fifth Circuit and district court considered Mr. Rapier's case under the *Strickland* standards for a claim of ineffective assistance of counsel in the *trial* process, neither court actually considered his claim of denial of his constitutional rights in the *plea process* under *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985), in spite of having paid lip service to the case.

Moreover, while the lower courts addressed his defenses under the First Amendment and Fourth Amendment, they never addressed his statutory affirmative defense under 18 U.S.C. § 2252A(d). This section provides in relevant part:

> ...it shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant -- (1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof -- (A) took reasonable steps to destroy each such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

*Id.*

The lower courts' analyses as to whether Petitioner's First and Fourth Amendment defenses were viable at trial did not and could not determine his Sixth Amendment claim of violation of his rights in the plea process due to counsel's failure to advise Petitioner of his available and viable

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*Strickland*, the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill*, the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.").

statutory defense under 18 U.S.C. § 2252A(d) based on the fact that he'd deleted the offensive images[7] from his computer. Petitioner pleaded 'apples'. The lower courts addressed 'oranges' and denied on that basis.

To the extent that the Fifth Circuit utilized the wrong standard of review, this constitutes an important reason to VACATE and REMAND. To the extent that the Fifth Circuit applied the right standard of review the wrong way, this constitutes an even more important reason to VACATE and REMAND; to maintain the uniformity of the decisions of the Courts of Appeals.

Based on the foregoing, the decision by the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in Mr. Rapier's case.

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[7] This is not a case where large quantities of unlawful images were recovered from the hard drive. The record indicates that only a few of the recovered images appeared to be unlawful when downloaded and these appeared to be computer generated 'virtual' images so, under *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02), they were *not* unlawful. The only image which had not been deleted involved a young man of "indeterminate age". This, of course, is a lawful image.

## CONCLUSION

For all of the foregoing reasons, Petitioner Donald Rapier respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of his Request for Certificate of Appealability and **REMAND** to the court of appeals for reconsideration in light of *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

**DONALD RAPIER**
**% Ronald Raper**
**6435 Ladera Drive**
**Houston, TX 77083**

Date: _____

No.

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# Supreme Court of the United States

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**DONALD RAPIER,**

***Petitioner,***

**vs.**

**UNITED STATES OF AMERICA,**

***Respondent.***

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## APPENDIX

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**COMES NOW PETITIONER Donald Rapier** and submits the attached appendix pursuant to Supreme Court Rules.

**DONALD RAPIER**
**% Ronald Raper**
**6435 Ladera Drive**
**Houston, TX 77083**

Date:_____

# APPENDIX A

## ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 5-11-04

IN THE UNITED STATES COUNT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20022
USDC No. H-03-CV-5384
H-00-CR-76-ALL

U.S. COURT OF APPEALS
FILED
MAY 11, 2004
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
DONALD DEE RAPIER,
also known as Donald Q. Rapier,
Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas

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ORDER

Donald Dee Rapier, federal prisoner #68096-079, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion in which he challenged his guilty-plea conviction for interstate or foreign transportation of child pornography and possession of child pornography. Rapier argues that counsel's advice and lack of advice regarding potential defenses caused his guilty plea to be unknowing and involuntary. He argues that the district court erred in considering whether he would have been found guilty after trial instead of considering whether, but for counsel's assistance, he would have pleaded not guilty and proceeded to trial. He argues that the district court did not address his arguments that counsel failed to investigate a defense based upon his deleting the images from his computer and that counsel was ineffective for failing to advise him of a potential defense based upon the Ninth

Circuit's opinion in *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1090-91 (9th Cir. 1999) aff'd, *Ashcroft v. Reno*, 535 U.S. 234 (2002). He argues that the district court was wrong to consider whether he admitted the fact that the images contained actual minors at the plea hearing because, if he had not received ineffective assistance, there would have been no plea hearing and, thus, no admission. Finally, he argues that the district court erred in not granting him an evidentiary hearing.

A COA will be issued only if the movant makes a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2). If the district court's dismissal is on the merits, "The [Movant) must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As Rapier has not made the required showing to obtain a COA, his motion for a COA is DENIED. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

## APPENDIX B

## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED 6-6-00

ENTERED JUNE 06, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
DONALD DEE RAPIER

[] See Additional Aliases Sheet

Case Number: 4:00CR00076-001
Defendant's Attorney: Jay T. Karahan

THE DEFENDANT:
[x] pleaded guilty to count(s) 1 and 2 on March 6,2000.

[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section: 18 U.S.C. §2252A(a)(1) and §2256
Nature of Offense: interstate or foreign transportation of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 1
Title & Section: 18 U.S.C. §2252A(a)(5)(B) and §2256
Nature of Offense: Possession of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 2

[] See Additional Counts of Conviction Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[] Count(s)_____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 440-44-5345
Defendant's Date of Birth: 02/22/1946
Date of imposition of Judgement: May 26, 2000
Defendant's USM No.: 88096-079
Defendant's Residence Address: 8787 Woodway, #1305, Houston, TX 77063.
Defendant's Mailing Address: 8787 Woodway, #1305, Houston, TX 77063.

Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE
Date: June 2, 2000

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 month(s).

The term consists of SIXTY (60) MONTHS on each of Counts 1 and 2 to run concurrently.

[] See Additional Imprisonment Terms Sheet
[x] The Court makes the following recommendations to the Bureau of Prisons: That the defendant be incarcerated at the federal institution located at Burner, North Carolina.
[] The defendant is remanded to the custody of the United States Marshal.
[] The defendant shall surrender to the United States Marshal for this district

[] _____ on _____
[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by2 p.m. on _____
[x] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATESMARSHAL

By

_____
Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).
The term consists of THREE (3) YEARS as to each of Counts 1 and 2, to run concurrently.
[] See Additional Supervised Release Terms Sheet
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
*For offenses committed on or after September 13, 1994:*
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION
[x] See Special Conditions of Supervision Sheet 3.01

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U S.C. § 2248, 2259 2264. 2327. 3663 3663A, and/or 3664 The defendant shall also pay the assessment imposed m accordance with Title 18 US.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any maternal change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from Incurring new credit charges or opening additional lines of credit without approval of the probation officer, unless the defendant is in compliance with the fine or restitution payment schedule.

The defendant is required to participate in a mental health program as deemed necessary and approved, by the probation officer. The defendant will incur costs associated with such programs, based on ability to pay as determined by the probation officer.

The defendant shall register with the sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

The defendant shall not possess a computer or obtain access to any computer system outside of that required for employment. Should he have access to a computer for employment, he is prohibited from accessing or using the Internet during his term of supervision. If the defendant requires the use of the Internet, the probation officer to assess request for Internet usage. Also, the defendant shall grant to the probation officer access to any computer used by the defendant to ensure compliance with the conditions of his supervision.

The defendant shall not possess any type of pornography unless approved by a physician.

The defendant Js required to participate in a sex offender treatment program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such program, based upon ability to pay as determined by the probation officer.

The defendant shall not have contact with children less than 18 years of age without adult supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Assessment: $200.00
Fine: $6,000.00
Restitution:

A $100 special assessment is ordered for each count, for a total of $200.

[] if applicable, restitution amount ordered pursuant to plea agreement.

[] See Additional Terms for Criminal Monetary Penalties Sheet.

## FINE

[] The above fine includes costs of incarceration and/or supervision in the amount of $0.00 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612 (g).

[] The Court determined that the defendant does not have the ability to pay interest and it is ordered that.

[] The interest requirement is waived

[] The interest requirement is modified as follows

## RESTITUTION

[] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| Totals: $0.00 | | $0.00 | |

[] See Additional Victims

## SCHEDULE OF PAYMENTS

Payments shall be applied ;n the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of 3secution: (5) interest: (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

1) [] in full immediately: or

2) [x] $6,200.00 immediately, balance due (in accordance with C, D, or E); or

3) [] not later than _____; or

4) [] in installments to commence 30 day(s) after the date of this judgment.

In the event the entire amount of criminal monetary penalties imposed is not

paid prior to the commencement of supervision, the U.S. probation officer

shall pursue collection of the amount due, and shall request the court to

establish a payment schedule if appropriate; or

5) [] in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____

over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

[] Joint and Several

[] See Additional Joint $ Several Defendants

[] The defendant shall pay the cost of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

[] See Additional Forfeited Property Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[x] The Court adopts the factual findings and guideline application in the presentence report.

OR

[]The Court adopts the factual findings and guideline application in the presentence report except:

[] See Additional Findings and Guideline Application Exceptions Sheet

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: I

Imprisonment Range: 27 to 33 months.

Supervised Release Range: 3 to 5 years.

Fine Range: $6,000.00 to $60,000.00

[] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment

of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of

[] Partial or no restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

[] See Additional Reasons for Point Within Range Sheet

OR

[x] The sentence departs from the guideline range:

[] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following specific reason(s):

Due to enhancement provisions pursuant to 18 USC. § 2252A(b)(1) and (b)(2).

[] See Additional Reasons for Departure From The Guideline Range Sheet

# APPENDIX C

## ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 1-24-02

2002 U.S. App. LEXIS 3816, *

USA v. Rapier

00-20514

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2002 U.S. App. LEXIS 3816

January 24, 2002, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: United States District Court for the Southern District of Texas. H-00-CR-76-ALL.

OPINION: Affirmed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT U. S. COURT OF APPEALS
FILED JAN 24 2002
CHARLES R. FULDRUGE CLERK
No. 00 20514
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff Appellee, versus DONALD DEE RAPIER,

Defendant Appellant.

Appeal from the United States District Court for the Southern District of Texas USDC No. H 00 CR 76 ALL Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Donald Dee Rapier appeals from his guilty plea conviction and sentence on one count of foreign or interstate transportation of child pornography and one count of possession of child pornography. Rapier first complains that the district court erred at his re arraignment by failing to admonish him that he faced a mandatory minimum sentence of imprisonment under 18 U.S.C. § 2252A(b) as a result of his prior conviction for indecency with a child under Texas state law. The district judge did err. However, prior to imposing sentence the district judge put Rapier on notice of the mandatory minimum sentence and gave Rapier the opportunity to withdraw his guilty plea. Rapier declined to do so. Because the district court complied with FED. R. CRIM. P. 11 prior to entering judgment and coupled its compliance

with provision of an opportunity to withdraw the guilty plea, the error made at re arraignment was rendered harmless. See *United States v. Johnson*, 1 F.3d 296, 303 04 (5th Cir. 1993) (en banc) (error was harmless where failure of judge to advise defendant of his mandatory minimum sentence could not have affected decision to plead guilty); see also *United States v. Gulledge*, 491 F.2d 679, 679 (5th Cir. 1974) (where district court failed to make a full determination of the factual basis prior to accepting guilty pleas, there was no reversible error where, prior to entering judgment, court complied with FED. R. CRIM. P. 11 and gave defendants an opportunity to withdraw their pleas).

Rapier next argues that his Texas sexual offense, which was disposed of through deferred adjudication, is not a "prior conviction" within the meaning of the enhancement provision. Rapier's argument fails under *United States v. Cisneros*, 112 F.3d 1272, 1280 82 (5th Cir. 1997) (defendant's Texas guilty plea that resulted in a deferred adjudication was a "prior conviction" for purposes of sentence enhancement provision).

Rapier next argues that after failing to admonish him of the minimum and maximum sentences to which he was exposed, the district court compromised his ability to later withdraw his guilty plea by ordering him to register as a sex offender with the State of Texas and to participate in a course for sexual offenders. The record does not reveal that the district court ordered either of these actions. Giving Rapier's pro se brief liberal construction, Rapier contends that he was obliged to take these actions following the entry of a guilty plea at his re arraignment in reliance on the district judge's incorrect admonishment. However, the record shows that Rapier's participation in a course for sexual offenders pre dated his guilty plea, and given evidentiary rules precluding the admission of evidence of a withdrawn plea of guilty, see FED. R. Evid. 410; FED. R. CRIM. P. 11 (e) (6) , Rapier

cannot demonstrate that his ability to withdraw his guilty plea and proceed to trial was compromised due to error below.

Rapier also argues that the Government provided inadequate notice of its intention to seek enhancement of his sentence prior to entry of his original guilty plea. There is no statutory provision mandating that the Government give notice of its intention to seek an enhanced sentence under 18 U.S.C. 9 2252A(b). Further, in crimes involving the sexual exploitation of children, this court is bound to enforce a mandatory minimum sentence prescribed for a second conviction, even where the Government does not seek the enhanced penalty. See *United States v. Schmeltzer*, 960 F.2d 405, 408 09 (5th Cir. 1992) (vacating sentence as inconsistent with the minimum sentence prescribed for a second conviction under 18 U.S.C. § 2252(a)(2),(b)(2)).

Rapier also complains that he received ineffective assistance of counsel. This court does not review ineffective assistance of counsel claims on direct appeal except in the rare case where the record permits a fair evaluation of the merits of the claim. See *United States v. Crooks*, 83 F.3d 103, 1o8 (5th Cir. 1996). Rapier's ineffective assistance of counsel claims were not presented to the district court. The record is therefore insufficient to permit evaluation of the claim at this time. See *United States v. Navelar*, 963 F.2d 732, 735 (5th Cir. 1992).

The judgment of the district court is AFFIRMED.

## APPENDIX D

## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED 12-8-03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CRIMINAL NO. H-00-0076-001
(Civil Action No. H-03-5384)
UNITED STATES OF AMERICA,
V.
DONALD DEE RAPIER,
MEMORANDUM AND ORDER

The defendant, Donald Dee Rapier, has filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Criminal Docket No. 46). The Court has carefully considered the pending motion along with the records of the prior criminal proceeding. Based on this review, the Court's clear recollection of the relevant proceedings, and the application of governing legal authorities, the Court denies the § 2255 motion filed by the defendant and dismisses the corresponding civil case for reasons set out below.

1. BACKGROUND

Agents with the United States Customs Service encountered Rapier at Houston's George Bush Intercontinental Airport on July 4, 1999, upon his return from Bangkok, Thailand, by way of a non-stop flight from Tokyo, Japan. Noting Rapier's name on a list of individuals identified in an undercover operation designed to target violators of federal child pornography laws through the use of computer bulletin board systems, agents referred Rapier to a secondary area for an inspection. Various homosexual photographs were found on Rapier's lap-top computer, including one that featured Rapier performing oral sex on a young Asian male of undetermined age. As a result, the lap-top was seized. Agents later discovered additional pornographic images on the lap-top, depicting children under the age of 18 engaged in sexually explicit conduct.

On February 14, 2000, a federal grand jury in this district returned a two-count indictment against Rapier, charging him with interstate or foreign transportation of child

pornography in violation of 18 U.S.C. §§ 2252A(a)(1) and 2256 and possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256. (Criminal Docket No. 1). On March 6, 2000, Rapier pleaded guilty to the charges lodged against him without the benefit of a plea agreement. (Criminal Docket No. 13).

Following Rapier's rearraignment, the Court ordered the Probation Office to conduct an investigation and prepare a presentence report (a "PSR"). The PSR recommended a base offense level score of 17, with an additional 4 points for specific offense characteristics because the crime involved a prepubescent minor and the use of a computer, giving Rapier an adjusted base offense level score of 21. After a 3-level reduction for acceptance of responsibility, the PSR assigned a total offense level score of 18.

The investigation conducted by the Probation Office revealed that Rapier had a prior criminal conviction in state court for indecency with a child. With a base offense level score of 18 and his placement in Criminal History Category 1, Rapier faced a prison sentence of 27 to 33 months under the Sentencing Guidelines. The PSR observed, however, that Rapier's prior conviction required the application of a mandatory minimum sentence prescribed by statute. Because of his prior conviction, Guideline § 5GI. I(b) mandated a minimum term of [*2] 5 years or 60 months and a maximum of 30 years' imprisonment pursuant to the child pornography statute under which Rapier was charged. See 18 U.S.C. § 2252A(b).

Consistent with the findings made in the PSR, the government filed a notice shortly before the scheduled sentencing proceeding, stating its intent to seek an enhancement of Rapier's potential sentence under the statute requiring a mandatory minimum term of imprisonment. (Criminal Docket No. 22). Rapier filed objections to the PSR and to the government's notice of enhancement. (Criminal Docket Nos. 21, 25). At the start of the sentencing hearing on May 26, 2000, the Court confronted Rapier with the fact that

he faced a mandatory minimum sentence and offered him an opportunity to withdraw his guilty plea; Rapier declined that offer. The Court overruled Rapier's objections and sentenced him to serve the minimum sentence allowed by law, consisting of concurrent terms of 60 months in prison on each count, plus three years' supervised release, and a fine of $6,000. (Criminal Docket Nos. 27, 3 1).

On direct appeal, Rapier complained that this Court failed to admonish him at his rearraignment regarding the possibility of a mandatory minimum sentence of 60 months' imprisonment. The Fifth Circuit agreed that this was error, but affirmed the conviction after finding that the Court gave Rapier notice of the mandatory minimum sentence at sentencing and an opportunity to withdraw his guilty plea prior to entering judgment. See United States v. Donald Dee Rapier, No. 00-20514 (5th Cir. Jan. 24, 2002) (unpublished). The Fifth Circuit also rejected the following arguments by Rapier: (1) that his conviction for indecency [*3] with a child was not a "prior conviction" for purposes of enhancing his sentence; (2) that the Court compromised his ability to withdraw his guilty plea by ordering him to register as a sex offender and to participate in a treatment program for sex offenders; and (3) that the government provided inadequate notice of its intent to enhance the sentence. See *id.* The Fifth Circuit declined to address Rapier's allegations of ineffective assistance of counsel.[1] See *id.*

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I. As the Supreme Court has recently explained, claims concerning ineffective assistance of counsel are more appropriately raised in the first instance on collateral review under 28 U.S.C. § 2255, rather than on direct appeal. See *Massaro v. United States*, ___ U.S. ___, 123 S. Ct. 1690, 155 L. Ed.2d 714 (2003).

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On October 7, 2002, the United States Supreme Court granted Rapier's petition for a writ of certiorari and remanded his case to the Fifth Circuit for further consideration in light

of the decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed.2d 403 (2002). In the *Free Speech Coalition* decision, the Supreme Court struck down portions of the Child Pornography Prevention Act of 1996 that criminalized possession and distribution of "virtual" child pornography (i. e., sexually explicit material produced by means other than using real children, such as through the use of youthful-looking adults or by using computer-imaging technology). In particular, the Supreme Court held that 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D), which outlawed any image that "is, or appears to be, of a minor engaging in sexually explicit conduct," and material "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression [that it depicts] a minor engaging in sexually explicit conduct," were unconstitutionally overbroad.

[*4] On remand, the Fifth Circuit affirmed the conviction once more, holding that the Free Speech Coalition decision did not affect the viability of Rapier's guilty plea. The Fifth Circuit observed that *Free Speech Coalition* struck down only the definition of child pornography found in §§ 2256(8)(B) and 2256(8)(D) involving virtual images that do not feature actual minors. See United States v. Donald Dee Rapier, No. 00-20514 (5th Cir. March 24, 2003) (unpublished). The Fifth Circuit noted that this Court, at the rearraignment, employed the definition of child pornography involving "actual minors" as set out in a portion of the statute not struck down by *Free Speech Coalition*, found in § 2256(8)(A), and that Rapier pleaded guilty based on this definition. See *id.* The Fifth Circuit concluded that, "[b]ecause Rapier pleaded guilty to offenses involving visual depictions of actual minors, *Free Speech Coalition* does not affect the validity of his convictions." *Id.* Rapier filed a second petition for a writ of certiorari from this decision, which the United States Supreme Court denied.

In his pending motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, Rapier complains that his

guilty plea was involuntarily made because it was tainted by ineffective assistance of counsel. (Criminal Docket No. 46). Pointing to the *Free Speech Coalition* opinion, Rapier alleges that he is "actually innocent" of the charges against him. Rapier contends that his attorney, Jay T. Karahan, conducted an incomplete factual investigation and gave erroneous advice concerning whether he had any valid defense to the charges. The Court concludes that a response by the government is not necessary and that [*5] an evidentiary hearing is not required.[2]

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2 Rapier's motion requests discovery as well. Specifically, Rapier asks that Karahan provide deposition testimony regarding his strategic choices. Because the record is adequate to dispose of Rapier's claims, his request for discovery is denied.

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Rapier's claims are addressed below under the applicable standard of review.

II. STANDARD FOR SECTION 2255 MOTIONS

To prevail on a motion under 28 U.S.C. § 2255, the movant must establish one of the following: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. See *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted). After a conviction and exhaustion or waiver of any right to appeal, a court is usually "entitled to presume that the defendant stands fairly and finally convicted." United States v. Willis, 273 F.3d 592, 595 (5th Cir. 2001) (citing *United States v. Frady*, 456 U.S. 152, 164, 102 S. Ct. 1584, 71 L. Ed.2d 816 (1982); *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991), cert. denied, 502 U.S. 1076 (1992)). As a result, review of convictions under § 2255 is limited to questions of constitutional or jurisdictional magnitude, which

may not be raised for the first time on collateral review without a showing of cause and prejudice. See *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). Of course, this procedural bar does not apply to claims that could not have been raised on direct appeal, such as those for ineffective assistance of counsel. See *Willis*, 273 F.3d at 598 n.7 [*6] (citations omitted); see also *Massaro v. United States*, ___ U.S. ___, 123 S. Ct. 1690, 155 L. Ed.2d 714 (2003) (holding that ineffective-assistance claims are not procedurally barred by a failure to bring those claims on direct appeal).

III. DISCUSSION

Claims of ineffective assistance of counsel are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To prevail under the *Strickland* standard, a defendant must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the alleged deficiencies. See *Williams v. Taylor*, 529 U.S. 3 90, 3 90-91, 120 S. Ct. 1495, 146 L. Ed.2d 389 (2000). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that rendered the result unreliable." *Strickland*, 466 U.S. at 687; see also *Carter v. Johnson*, 131 F.3d 452,463 (5th Cir. 1997), *cert. denied*, 523 U.S. 1099 (1998).

Counsel's performance is deficient under the *Strickland* standard if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 689; Hernandez v. Johnson, 213 F.3d 243, 249 (5th Cir.), cert. denied, 531 U.S. 966 (2000). Judicial scrutiny of counsel's performance must be "highly deferential," indulging in a "strong presumption" that "trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." West v. Johnson, 92 F.3d 1385, 1400 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997) (citing *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir.[*7] 1993), *cert. denied*,

509 U.S. 921 (1993)). To overcome this presumption, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Wilkerson*, 950 F.2d at 1065. However, mere "error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," *Strickland*, 466 U.S. at 687-90. In other words, a deficiency found in counsel's performance, standing alone, does not equal ineffective assistance if no actual prejudice is demonstrated.

Actual prejudice from a deficiency is shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Clark v. Johnson, 227 F.3d 273, 282-83 (5th Cir. 2000) (quoting *Strickland*, 466 U.S. at 694), cert. denied, 531 U.S. 1167 (2001). In the context of a guilty plea, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed.2d 203 (1985); *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000). To prevail, a § 2255 movant convicted upon his plea of guilt "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

Here, Rapier complains that his attorney's performance was deficient, and that he was actually prejudiced thereby, because Karahan committed the following errors: (1) he failed to file a motion to suppress or advise that the evidence seized from Rapier's lap-top computer [*8] was the product of an unconstitutional "extended border search"; (2) he failed to argue that the images seized from his computer were not actual children, but were instead computer-generated images which only appeared to be minors; (3) he erroneously advised that a plea

of guilty would result in a reduction in sentence that he would not have received following a plea of not guilty and a trial; and (4) he gave erroneous advice regarding whether to withdraw the guilty plea. Rapier's claims are examined below under the Strickland standard.

1 . Failure to Pursue a Motion to Suppress

Rapier argues that he was denied effective assistance of counsel because Karahan failed to file a motion to suppress the evidence seized from his computer on the grounds that agents conducted an unconstitutional "extended border search." In support of his claim that the evidence on his computer was seized illegally during an unconstitutional extended border search, Rapier cites two district court opinions: *United States v. Strouser*, 247 F. Supp.2d 1135 (E. D. Mo. 2003); and *United States v. Perez*, 247 F. Supp.2d 459 (S. D. NY 2003). These cases are not on point because neither one concerns the border search doctrine. Nor does Rapier demonstrate that an improper extended border search occurred.

Warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed.2d 564 (197 1). One important exception to the warrant requirement is the border search doctrine. See *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994). Under this doctrine, a governmental officer at the [*9] international border may conduct routine stops and searches without a warrant or probable cause because the United States as a sovereign state has the right to control what persons or property crosses its international borders. See *id.* (citing *United States v. Ramsey*, 43 1 U.S. 606, 616, 97 S. Ct. 1972, 52 L. Ed.2d 617 (1977); *United States v. Berisha*, 925 F.2d 79 1, 793-94 (5th Cir. 1991); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S. Ct. 3304, 87 L. Ed.2d 381 (1985) ("[T]he Fourth Amendment's balance of

reasonableness is qualitatively different at the international border than in the interior.")).

The border search doctrine is applicable to stops and searches conducted at the "functional equivalent" of the border, i.e., the first point at which an entrant may practically be detained. *Cardenas*, 9 F.3d at 1147 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S. Ct. 2535, 37 L. Ed.2d 596 (1973)). An international airport, such as the one that Rapier arrived at in Houston, is considered a "functional equivalent" of the border. *Id.* (citing *United States v. Klein*, 592 F.2d 909, 911 n.1 (5th Cir. 1979)). A search at the "functional equivalent" of the border is justified under the border search doctrine because "it is in essence no different than a search conducted at the border; the reason for allowing such a search to take place other than at the actual physical border is the practical impossibility of requiring the subject searched to stop at the physical border." *Id.* (citing *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982) (quoting *United States v. Garcia*, 672 F.2d 1349, 1363-64 (11th Cir. 1982)). Thus, a routine search made at the border or its functional equivalent may be made without probable cause or any suspicion to justify the search. [*10] *Cardenas*, 9 F.3d at 1148 (citing *United States v. Sandler*, 644 F.2d 1163, 1167-69 (5th Cir. 1981) (en banc)).

In contrast, under the "extended border search doctrine," a search may also take place beyond the border or its functional equivalent based on the reasonable suspicion of criminal activity. See, e.g., *United States v. Alvarado-Ramirez*, 975 F. Supp. 906, 915 (W.D. Tex. 1997) (citing *Cardenas*, 9 F.3d at 1148). In this case, Rapier's lap-top computer was seized by agents upon his arrival aboard an international flight at Houston's George Bush Intercontinental Airport. The initial search of Rapier's computer took place at the functional equivalent of the border, i. e., the airport, and not beyond that point. Accordingly, this search was not an extended border search. Moreover, law enforcement agents noted Rapier's name on a list of persons targeted as possible

violators of federal child pornography laws and they located pornography on the lap-top during this initial search. On this basis, Rapier fails to show that the evidence was seized illegally or that a motion to suppress would have been successful.

Because Rapier has demonstrated no viable claim, he cannot demonstrate that his trial attorney was deficient for failing to file a motion to suppress. See *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim.") (quoting *Smith v. Puckett*, 907 F.2d 5 81, 585 n.6 (5th Cir. 1990), cert. denied, 498 U.S. 1033 (199 1)); *Lavernia v. Lynaugh*, 845 F.2d 493, 499 (5th Cir. 1988) ("Counsel cannot be faulted for failing to pursue meritless motions.") [*11] (citations omitted); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984) ("Counsel is not required to engage in the filing of futile motions."). Accordingly, he has no ineffective-assistance claim on this ground.

2. Failure to Investigate or Present Evidence of Actual Innocence

Rapier complains that Karahan failed to argue or present evidence that he was actually innocent of the child pornography charges lodged against him by raising objections to the indictment based on the *Free Speech Coalition* decision, supra. Rapier appears to claim that the children portrayed in the pornographic images retrieved from his lap-top were virtual or "morphed" by computer graphics, and not actual children. Rapier alleges therefore that Karahan was deficient because he failed to conduct an adequate investigation into the law and the facts.

The record shows that Karahan's strategy was to raise objections to the PSR, the government's notice of intent to seek an enhanced punishment under the applicable mandatory minimum sentencing statute, and the timeliness of the government's notice. The record further shows that Karahan chose to emphasize his client's participation in

treatment in an effort to obtain a downward departure. Karahan did not challenge the constitutionality of the child pornography statutes or otherwise raise objections of the sort lodged in the *Free Speech Coalition* decision. Nor did he present evidence that the pornographic pictures found in Rapier's possession were not actual children.

As noted above, the grand jury returned its indictment against Rapier on February 14, [*12] 2000, and he entered his guilty plea on March 6, 2000. Rapier's sentencing occurred on May 26, 2000. A divided panel of the Court of Appeals for the Ninth Circuit decided to strike down portions of the Child Pornography Protection Act (the "CPPA") on December 17, 1999. See *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). The government filed a petition for rehearing in that case, which the Ninth Circuit denied on July 24, 2000. *Free Speech Coalition v. Reno*, 220 F.3d 1113 (9th Cir. 2000). At the time the Ninth Circuit issued its opinion, holding portions of the CPPA unconstitutional, at least two other circuit courts of appeal had reached the opposite result, holding that the CPPA passed constitutional muster. See *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999). Rapier acknowledges that the Ninth Circuit's *Free Speech Coalition* decision was not binding precedent in the Fifth Circuit at the time of his rearraignment and sentencing. (Docket No. 46, at ¶37). The United States Supreme Court did not resolve the circuit split until April 16, 2002, long after the conclusion of Rapier's guilty plea and sentencing proceedings. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed.2d 788 (2002).

Because a split of authority existed on the issue, Karahan's failure to raise objections similar to those presented in the Ninth Circuit's Free Speech Coalition decision is not clearly deficient. Further, even assuming that there was a deficiency, Rapier has not demonstrated any actual prejudice. As the Fifth Circuit has already found, Rapier entered his guilty plea pursuant to a statutory

definition of child pornography left unaffected by the Supreme [*13] Court's *Free Speech Coalition* opinion. See *United States v. Donald Dee Rapier*, No. 00-20514 (March 17, 2003). At the rearraignment in this case, the government outlined the existing evidence, including images or pictures "of children" found on Rapier's lap-top computer, which "depicted minors under the age of 18 engaged in sexually explicit conduct." (Rearraignment Transcript, at 12-15). Rapier acknowledged that the government's factual summary was accurate. (See *id.* at 15). Rapier then pleaded guilty to the child pornography charges listed in the indictment, and there was no dispute that the visual images at issue depicted real children:

> COURT: Did you intend to download photos that were pictures of people under the age of 18?
>
> RAPIER: Yes, ma'am.
>
> COURT: Engaging [in] sexual - explicit sex acts?
>
> RAPIER: Yes, ma'am.

(Rearraignment Transcript, at 16).

> COURT: ... I want to be clear, Mr. Rapier, were you aware that the photos that you had downloaded onto your computer, in fact, showed kids engaging in sex, one or more children engaging in sex?
>
> RAPIER: Yes, ma'am.

(Rearraignment Transcript, at 21).

At the sentencing, Rapier reiterated that he was "sincerely sorry," and that he realized his actions had "affected a lot of people, particularly the children involved (Sentencing Transcript, at 45).

The bottom line is that Rapier presents no evidence, undiscovered by Karahan, [*14] showing that the pornographic pictures recovered from his lap-top computer were of virtual children, and not real ones.[3] It is true that pro se petitions filed under 28 U.S.C. § 2255 are

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3. Rapier provides an example of computerized "morphing." (Criminal Docket No. 46, Ex. L). Rapier also points to testimony before Congress by Ernest E. Allen, President of the National Center for Missing and Exploited Children, who opined that "advances in technology have made virtual child porn indistinguishable from actual child porn," and lamented that, "in most cases it will be impossible for law enforcement and prosecutors to establish with certainty, which is which." (Criminal Docket No. 46, Ex. K, at 6). However, neither of these items constitute evidence establishing Rapier's actual innocence of the offense in this case.

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entitled to a liberal construction. *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). "At the same time, however, mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *Id.* (citing *United States v. Woods*, 870 F.2d 285,288 n.3 (5th Cir. 1989)). In particular, the Fifth Circuit has "made clear that conclusory allegations of ineffective assistance of counsel" do not raise a constitutional issue on collateral review. *Collier v. Cockrell*, 300 F.3d 577, 587 (5th Cir.) (citing *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)), cert. denied, - U.S. - , 123 S. Ct. 690 (2002). Absent a showing of actual prejudice resulting from counsel's deficient performance, Rapier's ineffective-assistance claim on this issue fails.

3. Erroneous Advice on Sentencing Range

Rapier contends that Karahan was deficient for giving incorrect advice concerning his potential sentence. In particular, Rapier claims that Karahan advised him he would receive a reduced sentence if he pleaded guilty. Rapier maintains that, because he later learned that his sentence was subject to a mandatory minimum term of 5 years or 60 months [*15] imprisonment, this advice was incorrect.

The record in this case shows that Rapier only became eligible for a statutory mandatory minimum term of 5

years or 60 months in prison after the government filed its notice of intent to enhance the sentence with Rapier's prior state conviction for indecency with a child. The government filed that notice on May 23, 2000, well after the rearraignment, but only shortly before the sentencing on May 26, 2000. Rapier cannot show that Karahan was deficient at the rearraignment for advising him that he faced a reduced sentence for pleading guilty. The PSR's calculations under the Sentencing Guidelines did include a 3-level downward adjustment to Rapier's base offense level score for acceptance of responsibility. It was not until after the rearraignment, when the government filed its notice of intent to enhance the punishment with Rapier's prior state conviction, that it became clear Rapier could be subject to the mandatory minimum sentence.

Even if the Court were to assume that Karahan was somehow deficient for failing to foresee that the mandatory minimum sentence would apply, Rapier cannot demonstrate actual prejudice. The applicability of the 5 year or 60 month mandatory minimum sentence and Rapier's objections to the enhancement were hotly disputed at the outset of Rapier's sentencing hearing. (Sentencing Transcript, at2-43). During that discussion, the Court gave Rapier every opportunity to withdraw his guilty plea. The government was not opposed to a withdrawal of the guilty plea. Nevertheless, Rapier declined to withdraw his plea. Because Rapier cannot demonstrate any actual prejudice resulting from a deficiency, he cannot make [*16] an ineffective-assistance claim on this allegation.

4. Failure to Give Adequate Advice Regarding Withdrawal of Plea

Rapier alleges that his counsel failed to give him helpful advice at the sentencing hearing about whether he should withdraw his guilty plea. Rapier explains that he was hampered in his decision to withdraw the plea because, pursuant to the Court's requirements at the rearraignment, he had already turned himself in to the police for registration as a sex offender and enrolled in a sex offender treatment

program offered by the Baylor College of Medicine. Rapier reasoned that these requirements "incriminated" him, making a withdrawal of the plea and insistence upon a trial "fruitless." Rapier complains that Karahan could have, but did not, advise him that the evidence of his withdrawn guilty plea was inadmissible under Rule 11(e)(6) of the Federal Rule of Criminal Procedure and Rule 410 of the Federal Rules of Evidence.[4] (Criminal Docket No. 46, at ¶40A).

---------- start footnote ----------

4. Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide, generally, that plea discussions, related statements, pleas of guilty which are later withdrawn are inadmissible in a civil or criminal proceeding against the defendant unless the plea or statement "ought in fairness be considered contemporaneously" with another statement made by the defendant.

---------- end footnote ----------

Rapier contends that, but for his counsel's failure to give adequate advice, he would have withdrawn his guilty plea and proceeded to trial.

Assuming that Karahan's failure to advise Rapier constitutes deficient performance, Rapier does not establish actual prejudice. Rapier does not show, in that regard, a reasonable probability that the result of his proceeding would have been any different. Rapier received [*17] a sentence of 60 months in prison, the minimum amount allowed by the applicable law. He has not presented evidence establishing his actual innocence. Based on the recitation of proof provided by the government at the rearraignment, Rapier further fails to show that a reasonable jury would have voted not guilty. In other words, this record does not establish r that Rapier would have fared any better by going to trial than he did by pleading guilty, Therefore, the Court concludes that Rapier has not shown that any deficient performance by his counsel caused the outcome to be unreliable or the proceeding to be fundamentally unfair. *Lockhart v. Fretwell,*

506 U.S. at 372. Rapier has not demonstrated a valid claim for ineffective assistance of counsel on this issue. Therefore, the Court concludes that he is not entitled to relief under 28 U.S.C. § 2255.

IV. CERTIFICATE OF APPEALABILITY

The defendant's § 2255 motion is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214, codified as amended at 28 U.S.C. § 2253. Thus, a certificate of appealability is required before an appeal may proceed. See *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir.) (noting that actions filed under either 28 U.S.C. § 2254 or § 2255 require a certificate of appealability), *cert. denied sub nom. Monroe v. Johnson*, 522 U.S. 1003 (1997). "This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . .'" *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing 28 U.S.C. § 2253(c)(1)).

A certificate of appealability will not issue unless the movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed.2d 542 (2000) (internal quotations and citations omitted). Stated differently, where claims have been dismissed on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* On the other hand, there is a two-prong test when the denial of relief is based on procedural grounds. In that situation, the movant must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the

denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." Id.; see also *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed.2d 931 (2003).

A district court may deny a certificate of appealability, sua sponte, without requiring further briefing or argument. See *Alexander v. Johnson*, 211 F.3d. 895, 898 (5th Cir. 2000). Given that the issues presented involve clearly settled areas of the law, the Court concludes that jurists of reason would not debate whether the movant has stated a valid claim, or whether the procedural ruling in this case was correct. Accordingly, a certificate of [*19] appealability will not issue.

V. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Rapier has failed to establish a legal basis for the relief he seeks under 28 U.S.C. § 2255 and that his motion is subject to dismissal pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts. As a result, the Court hereby ORDERS as follows:

1.The defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Criminal Docket No. 46) is DENIED.

2. The corresponding civil action (H-03-5384) is DISMISSED WITH PREJUDICE.

3. A certificate of appealability is DENIED.

The Clerk shall provide a copy of this order to the parties. The Clerk shall also place a certified copy of this order with the file in Civil Action No. H-03-5384.

SIGNED at Houston, Texas, on December8, 2003.

NANCY F. ATLAS

UNITED ST4TES DISTRICT COURT [*20]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CRIMINAL NO. H-00-0076-001
(Civil Action No. H-03-5384)
UNITED STATES OF AMERICA,

V.

DONALD DEE RAPIER,

FINAL JUDGMENT

Based on the reasons set forth in the Court's Memorandum and Order of even date, it is ORDERED that the defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Criminal Docket No. 46) is DENIED.

This is a FINAL JUDGMENT in Civil Action No. H-03-5384.

The Clerk shall provide a copy of this order to the parties. The Clerk shall also place a certified copy of this order with the file in Civil Action No. H-03-5384.

SIGNED at Houston, Texas, on. December 8, 2003.

NANCY F. ATLAS

UNITE DISTRICT JUDGE

## APPENDIX E

## JUDGMENT OF THE UNITED STATES SUPREME COURT DATED 10-7-02

123 S. Ct. 69; 154 L. Ed. 2d 2, *;
2002 U.S. LEXIS 5396, **; 71 U.S.L.W. 3233

DONALD RAPIER v. UNITED STATES

*01-1731*

SUPREME COURT OF THE UNITED STATES

123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396; 71 U.S.L.W. 3233; 2002 Cal. Daily Op. Service 10185; 2002 Daily Journal DAR 11699

October 7, 2002, Decided

PRIOR HISTORY: *United States v. Rapier*, 31 Fed. Appx. 836, 2002 U.S. App. LEXIS 3816 (2002)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

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# APPENDIX F

## USCA 5 ORDER ON REMAND
## DATED 3-17-03

U.S. COURT OF APPEALS
FILED
MAR 17 2003
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20514
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD DEE RAPIER,
also known as Donald D. Rapier,
Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CR-76-ALL

---

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Donald Rapier was convicted, following guilty pleas, of one count of foreign or interstate transportation of child pornography

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

except under the limited circumstances set forth in STH CIR. R. 47.5.4.

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and one count of possession of child pornography. This court affirmed. See *United States v. Rapier*, No. 00-20514 (Jan. 24, 2002) (unpublished), vacated, 123 S. Ct. 69 (2002). The Supreme Court vacated and remanded for reconsideration in light of *Ashcroft v. Free Speech coalition*, 535 U.S. 234 (2002).

Following remand, the parties were directed to address the effect, if any, of Free Speech Coalition and whether the matter should be remanded to the district court for further proceedings. We do not regard the Supreme Court's remand for reconsideration as invalidating the conviction and sentence. See *United States v. Slanina*, 313 F.3d 891, 892 (5th Cir. 2002). Because *Free Speech Coalition* does not affect the viability of Rapier's guilty plea, we AFFIRM for the reasons expressed in our original opinion, with the following additional explanation:

In *Free Speech Coalition*, 535 U.S. at 254-58, the Court determined that, because the provisions of 18 U.S.C. § 2256(8)(B) and (D) , which define "child pornography," extend to visual depictions that do not involve actual minors, and thus prohibit the freedom to engage in a substantial amount of lawful speech, they are overbroad and unconstitutional. The Court noted that the definition found in § 2256(8) (A) prohibits pornographic images made using actual minors, a prohibition acceptable under *United States v. Ferber*, 458 U.S. 747 (1982). See *Free Speech coalition*, 535 U.S. at 241.

At Rapier's rearraignment, the district court employed only the definition provided by § 2256(8) (A) This provision was unaffected by the decision in *Free Speech Coalition*, and it remains

viable. See *United States v. Paul*, 274 F.3d 155, 160-61 (5th Cir. 2001), *cert. denied*, 535 U.S. 1022 (2002); *United States v. Reed*, 304 F. 3d 358, 364 n.3 (5th Cir. 2002); *United States v. Kelly*, 314 F.3d 908, 911-913 (7th Cir. 2003). Because Rapier pleaded guilty to offenses involving visual depictions of actual minors, *Free Speech Coalition* does not affect the validity of his convictions. Although Rapier's indictment also contained the definitions struck down by *Free Speech Coalition*, these definitions were independent of, and unnecessary to, the offenses of which he pleaded guilty and thus are not fatal to his convictions. See *United States v. Nunez*, 180 F.3d 227, 233 (5th Cir. 1999).

The issues raised by Rapier on direct appeal are unaffected by *Free Speech Coalition*. The judgment is AFFIRMED.

# APPENDIX G

## JUDGMENT OF THE UNITED STATES SUPREME COURT DATED 6-2-03

539 U.S. 904; 123 S. Ct. 2258;
156 L. Ed. 2d 113; 2003 U.S. LEXIS 4314, *

Donald Rapier, Petitioner v. United States.
02-1572
SUPREME COURT OF THE UNITED STATES
539 U.S. 904; 123 S. Ct. 2258; 156 L. Ed. 2d 113; 2003 U.S. LEXIS 4314; 71 U.S.L.W. 3750

June 2, 2003, Decided

PRIOR HISTORY: United States v. Rapier, 64 Fed. Appx. 417, 2003 U.S. App. LEXIS 6123 (5th Cir. Tex., Mar. 17, 2003)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

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